



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

October 4, 2012

Washington State Department of Ecology
c/o Tom Clingman
PO Box 47600
Olympia, WA, 98504

RE: State Environmental Policy Act Rule Making

Dear Mr. Clingman:

I appreciate the opportunity to provide comments on the proposed State Environmental Policy Act (SEPA) rule revisions.

The Confederated Tribes and Bands of the Yakama Nation is a federally recognized Indian tribe under the Treaty of June 9, 1855 (12 Stat. 951). Under Article III of the Treaty, the Yakama Nation reserved rights to fish at all usual and accustomed places, together with the privilege of hunting and gathering roots and berries, both within and outside of its reservation. The Yakama Nation has a vested interest in any state rule making that has the potential to negatively affect any cultural resources or treaty reserved rights, including Yakama Nation water rights.

Please find attached correspondence to me from my staff. I concur with the findings of the report for cultural and natural resource protection.

Sincerely,

Philip Rigdon
Deputy Director of Natural Resources
Yakama Nation

CC File

MEMORANDUM

TO: Phil Rigdon, Deputy Director, DNR
THROUGH: Scott Nicolai, Yakima Subbasin Habitat Coordinator, YKFP
FROM: John Marvin, Habitat Biologist, YKFP
DATE: Tuesday, October 02, 2012
RE: State Environmental Policy Act Rule Making 2012

Background

Ecology is in the process of two rounds of updates to the State Environmental Policy Act (SEPA) rules (Chapter 197-11 WAC), as directed by the 2012 legislature. The legislature directed Ecology to modernize the rules that guide state and local agencies in conducting SEPA reviews, in light of the increased environmental protections in place under the Growth Management Act (RCW 36.70A), Shoreline Management Act (RCW 90.58) and other laws. This legislative direction is provided in Senate Bill 6406 (now codified as Chapter 1, Laws of 2012 1st Special Session), specifically in Section 301. The bill also revised certain aspects of SEPA procedures that took effect July 10, 2012.

The legislation sets up two rounds of rule updates: A narrowly focused initial round (targeted to be complete by the end of 2012) and a broader round of SEPA rule updates during 2013. As directed by Section 301 of the bill, the initial rule making will consider two specific topics:

- Increasing the thresholds for SEPA review of minor construction projects under Washington Administrative Code (WAC) 197-11-800(1) and (23)(c); and
- Improving the efficiency of the environmental checklist in WAC 197-11-960.

Senate Bill 6406 also directs Ecology to convene a SEPA Advisory Committee to assist Ecology in updating the SEPA exemption thresholds and the environmental checklist. I was placed on the advisory committee in July of this year. The advisory committee has met three times this year; 08/14/2012, 09/11/2012, and 10/02/2012.

Staff Recommendations

Staff's experience in the Yakama Nation Ceded lands is that SEPA is a necessary and vital tool to ensure that treaty reserved rights and cultural resources are protected. In addition, SEPA is often the only avenue for tribal participation in local land use processes. The levels of sophistication with regards to application of land use controls vary widely across the state, and it is staff's experience that the majority of local governments within the ceded lands do not have a firm grasp on the purpose of SEPA and environmental review; it is often seen as just another "permit" to issue. The justification of the legislature is that we now have GMA/SMA and the protection of critical areas; therefore, we can "relax" SEPA environmental review. There are local governments in the ceded lands that did not have a critical areas ordinance until 2010, or where staff's are so small that the fire chief is the SEPA responsible official. Any amendments to the SEPA administrative rules need to take this into consideration; where jurisdictions with the requisite level of sophistication and ability to implement its land use controls have SEPA flexibility, and those that do not should at least maintain the status quo.

The purpose of SEPA is “to declare a state policy which will encourage . . . harmony between humankind and the environment, . . . prevent or eliminate damage to the environment, . . . and enrich the understanding of the ecological systems and natural resources . . .” (RCW 43.21C.010).

The legislature . . . declares that it is the continuing policy of the state of Washington . . . to use all practicable means and measures, including financial and technical assistance, in a manner calculated to . . . fulfill the social, economic, and other requirements of present and future generations of Washington citizens. In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the state of Washington and all agencies of the state to use all practicable means . . . **to improve and coordinate plans, functions, programs, and resources to the end that the state and citizens may . . . preserve important historic, cultural and natural aspects of our national heritage** (RCW 43.21C.020).

The legislature authorizes and directs that, to the fullest extent possible, the policies, regulations, and laws of the state of Washington shall be interpreted and administered in accordance with the policies set forth in the act, and that all branches of the government of this state, including state agencies . . . shall: utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man’s environment (RCW 43.21C.030).

Ecology submitted for review proposed draft rule making for increases in threshold exemptions, increases in threshold exemptions for electrical facilities, and efficiency changes to the environmental checklist on 09/25/2012.

In reminding the State of its responsibilities as set forth above, to improve, preserve and to administer its laws to prevent or eliminate damage to the environment, the Yakama Nation has participated in this Ecology Advisory Committee to assure that the Yakama Nation’s Treaty protected rights are recognized. With that in mind, these are the staff’s observations:

Threshold Exemptions

The threshold increases have two proposals; Proposal A with a general Tier 1 maximum and a Tier 2 of higher increases based on a higher level of scrutiny, with different levels inside and outside an Urban Growth Areas (UGA), and Proposal B limited to different thresholds inside and outside a UGA. In addition to proposed threshold increases, the proposal would require notice of SEPA exempt projects to the SEPA register.

At the beginning of the advisory group process, it was requested by numerous caucuses that any threshold increases be based on data; in an attempt to determine at what level does development not have a the potential for significant, adverse environmental impacts, and can therefore be exempted from SEPA review. No such data was ever provided. Each caucus submitted recommendations of new threshold levels. All of the recommendations appeared to be quite arbitrary, with no data or justification for the levels provided. The State caucus did however propose percentage increases based on a local review and analysis. The draft Ecology proposals also appear to be arbitrary with a lack of any data to base rule making on. While the state caucus proposal based on a percentage increase with a local review and analysis seems appropriate, it is probably too complex to address in the short time frame this year, in

addition to Ecology's Proposal A. If Ecology does put forth a proposal with tiered levels, it is imperative that the upper levels require a higher level of review and analysis for consistency with the act (RCW 43.21C). Until those that propose raising the threshold level for exemption from SEPA review, provide data to support that there will be no detrimental impact to the environment, Treaty protected natural and cultural resources, the Yakama Nation cannot agree to the levels presented in either Proposal A or B.

SEPA Notice

GMA does not require local governments to develop ordinances or regulations to protect cultural resources, and SEPA is often the only avenue for the tribe to provide comments on a proposals potential to disturb or destroy cultural resources. Ecology's proposal to require SEPA exempt projects to put notice in the SEPA register will not protect cultural resources. Notice without the opportunity to comment, or the ability to appeal a decision is useless.

Numerous jurisdictions in the ceded lands implement their CAO regulations at an administrative level, with no notice requirements unless SEPA is also required. Ecology's proposal to require SEPA exempt projects to put notice in the SEPA registrar will not protect treaty reserved rights. It appears tribes are lumped in with state agencies or other interested parties, which they should not. Additional notice to tribes will be on the agenda for the 2013 rule amendment.

Electrical Facilities

The SEPA threshold exemption for electrical facilities should not be raised, regardless if they are within existing rights-of-way or developed utility corridors. These designations do not ensure that proper environmental and cultural review has occurred. The proposed SEPA threshold exemption increase for electrical facilities from 55,000 volts to 115,000 volts could result in significant impacts to natural, cultural and archaeological resources (see photos of 115,000 volt transmission lines below). It is imperative that tribes, government agencies, the public, and decision makers are made fully aware of these potential impacts through the SEPA process prior to issuance of permits and commencement of construction.



Infrastructure for 115,000 volt transmission lines.

Please note, Yakama Nation expects that any new electrical facility that connects to the federal transmission system will go through the National Environmental Policy Act in addition to any local and state environmental and cultural review and permitting processes. This policy position has been communicated to the Bonneville Power Administration on several occasions.

SEPA Checklist

While many see the SEPA checklist as cumbersome or unnecessary, it is vital for tribal review of a proposal's potential effects to Treaty reserved rights and cultural resources. The majority of SEPA checklists reviewed within the Ceded lands are poorly prepared by the proponent and inadequately reviewed by local governments. The purpose of this process should not only be efficiency, but how to guide proponents to thoroughly prepare a SEPA checklist. For example, Question B13 of the SEPA checklist involves historic, archaeological and cultural resources. It has three parts:

- a. Are there any places or objects listed on, or proposed for, national, state, or local preservation registers known to be on or next to the site? If so, generally describe.
- b. Generally describe any landmarks or evidence of historic, archaeological, scientific, or cultural importance known to be on or next to the site?
- c. Proposed measures to reduce or control impacts, if any:

These questions are usually answered in ignorance: a) no, b) no, and c) not applicable.

The Yakama Nation has commented on proposals in SEPA to state agencies, counties and municipalities for years saying that this question cannot be answered in ignorance.

This question cannot be answered without a process that incorporates historic research, tribal consultation, data gathering and archaeological survey. SEPA rules require that decisions made during environmental review be based on sufficient information. Threshold determinations must be "based upon information reasonably sufficient to evaluate the environmental impact of a proposal (WAC 197-11-335)." WAC 197-11-080(1) states that "(I)f information on significant adverse impacts essential to a reasoned choice among alternatives is not known, and the costs of obtaining it are not exorbitant, agencies shall obtain and include the information in their environmental documents;" and "(W)hen there are gaps in relevant information or scientific uncertainty concerning significant impacts, agencies shall make clear that such information is lacking or that substantial uncertainty exists."

In addition to this, WAC 197-11-080(3) says that if information is not available or costs too much to obtain or if the means to obtain the information is speculative or unknown, the agency may proceed but it "shall generally indicate in the appropriate environmental documents its worst case analysis and the likelihood of occurrence, to the extent this information can reasonably be developed." Therefore, without a professionally reasoned archaeological investigation of a proposed project area, it must be assumed that the entire area contains an archaeological site of cultural significance.

The "help" button for the SEPA checklist for question B13b now includes really good information that comes straight from the Yakama Nation comments. B13a "Help" button is totally inadequate as it only talks about documenting structures over 50 years old. B13a should include the same "help" information as B13b. B13c is also good information on how to come up with measures to protect known sites.

If this is our opportunity to modify the questions, I would reverse part a. and b. The first part of the question should be to generally describe what historic, archaeological, scientific or cultural features and objects are on or adjacent to the proposed project. Proponents should be encouraged to do research of historic maps and records as well as consulting DAHP and Tribes. The not answering in ignorance should be the first information provided for the whole 3-part question. The second part should be to focus on what sites are on or adjacent to the proposal that may be eligible for inclusion in local, state or national registers of historic places. Then the third part is what measures are proposed to protect or mitigate affects to sites on or adjacent to the project.

Other Issues

Through the advisory committee meetings, a significant issue has arose concerning the distinction between the categorical exemption for construction or location of residential structures (WAC 197-11-800(1)(b)(i)) and the categorical exemption for short plats or short subdivisions (WAC 197-11-800(6)(a)). An interpretation on the difference from the State Attorney is requested. Yakama Nation will comment on this after reviewing the Attorney General's opinion.

cc: Office of Legal Counsel
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